

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS,	)	
	)	
Plaintiff,	)	
	)	No. CIV _____
vs.	)	
	)	
UNITED STATES FISH AND WILDLIFE	)	
SERVICE,	)	
	)	
Defendant.	)	
_____	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**I. Preliminary Statement**

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. §552 et seq., to compel the U.S. Fish and Wildlife Service (“FWS”), an agency of the U.S. Department of the Interior, to produce documents and records relating to the agency’s enforcement actions and decisions in connection with the unpermitted take of Mexican wolves in violation of the prohibitions of the Endangered Species Act (“ESA”).
2. This action arises from the FWS’s failure to comply with the requirements of FOIA in connection with WildEarth Guardians’ September 21, 2012 FOIA request seeking production of (a) an internal FWS memorandum believed to set forth agency policy

relative to the enforcement of individuals for illegal take of Mexican wolves and (b) other records relative to the FWS's enforcement decisions.

3. Plaintiff WildEarth Guardians is a New Mexico not-for-profit corporation devoted to research and public education concerning the management of public lands, including the protection of wildlife on public lands and the recovery of threatened and endangered species.
4. For more than 15 years, WildEarth Guardians has had a specific interest in the conservation and recovery of imperilled Mexican wolves in the southwestern United States, including the federal government's actions in connection with the reintroduction of this species into the wild.
5. The FOIA request that is the subject of this action was specifically intended to prompt the release of information concerning Mexican wolf conservation. As detailed below, the FWS has never made a final determination with respect to the FOIA request.
6. The FWS does not claim that there are any unusual circumstances which justify its failure to comply with the statutory requirements of the FOIA in this case.
7. The FWS's failure to provide a substantive response to WildEarth Guardians' FOIA request for documents and records constitutes a violation of the FOIA, and further constitutes constructive exhaustion of WildEarth Guardians' right to administratively appeal the FWS's violation of the mandatory requirements of FOIA. 5 U.S.C. §552(a)(6)(C)(i).
8. In this civil action, WildEarth Guardians seeks a court order declaring that the FWS's failure to provide a substantive response to WildEarth Guardians' request for documents

and records violates the FOIA and ordering the FWS to produce the requested documents and records. 5 U.S.C. §552(a)(4)(B).

## **II. Jurisdiction and Venue**

9. This Court has jurisdiction over this action under 5 U.S.C. §522(a)(4)(B) (FOIA), 28 U.S.C. §1331 (federal question), and 28 U.S.C. §1361 (mandamus).
10. Venue in this Court is proper under 5 U.S.C. §522(a)(4)(B) (FOIA), because Plaintiff WildEarth Guardians is a New Mexico not-for-profit corporation with its principal place of business in New Mexico.

## **III. Parties**

11. WildEarth Guardians is a not-for-profit conservation organization with its primary place of business in Santa Fe, New Mexico. WildEarth Guardians has approximately 4,500 members throughout the United States. WildEarth Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in the United States, and to safeguarding habitats relied upon by threatened and endangered species. In part, WildEarth Guardians works in furtherance of its goals by acquiring information regarding federal programs and activities through the federal Freedom of Information Act. WildEarth Guardians then compiles and analyzes that information and, subsequently, disseminates that information to its membership, the general public, and public officials through publications, reports, its website and newsletter, general news media coverage, and public presentations. WildEarth Guardians' successful efforts at educating the public on issues concerning federal government program and activities that affect the environment contribute significantly to the public's understanding of governmental

operations and activities. WildEarth Guardians also uses the information that it acquires through FOIA to participate in federal decision making processes, to file administrative appeals and civil actions, and generally to ensure that federal agencies comply with federal environmental laws. WildEarth Guardians and its members are directly injured by the FWS's failure to comply with the statutory requirements of FOIA and a favorable outcome of this litigation will redress that injury. WildEarth Guardians bring this action on behalf of itself, its staff, and its members.

12. Defendant FWS has a mandatory statutory duty to respond to FOIA requests that are made to the agency, and this action arises from the FWS's failure to perform its statutory duties under the FOIA in connection with two FOIA requests.

#### **IV. Facts**

13. In 2012, a WildEarth Guardians employee learned of an internal FWS memorandum which set forth FWS policy with respect to the treatment of individuals who killed Mexican wolves, a species protected by the ESA. This memorandum – known as the “McKittrick Memo” – is believed to direct that no enforcement action will be taken in those instances where offending individuals claimed they mistakenly believed that they were killing a coyote.
14. As a result of the McKittrick Memo, WildEarth Guardians believes that a pattern and practice has emerged whereby individuals who are hostile to the reintroduction of Mexican wolves into the wild intentionally kill those wolves and then justify that killing by feigning a belief that they were killing a coyote. This pattern and practice has a significant adverse impact on the conservation and recovery of the Mexican wolf.

15. WildEarth Guardians believes that the FWS knows of this pattern and practice – and abets it by implementation of the policy set forth in McKittrick Memo.
16. In an effort to better understand the FWS’s position with respect to the killing of Mexican wolves without any ESA permit, WildEarth Guardians submitted a FOIA request to the FWS on September 21, 2012 requesting (a) the McKittrick Memo and (b) other documents relating to FWS enforcement decisions in connection with the killing of Mexican wolves.
17. WildEarth Guardians subsequently received a post card from FWS assigning the September 21, 2012 FOIA request a tracking number and indicating that the request was assigned to a “complex track.”
18. On October 19, 2012, WildEarth Guardians agreed to the FWS’s request for an extension of time to file a final response to the subject FOIA request until and through December 14, 2012.
19. By December 3, 2012, WildEarth Guardians had received no further response from FWS in connection with the subject FOIA request. On that date, a WildEarth Guardians employee sent an e-mail to the FWS FOIA Officer in which she requested that a response to the request be made by December 14, 2012 to avoid litigation.
20. Again, even after the agreed-to extension had expired, the FWS did not provide any substantive response to the request or to the e-mail correspondence of December 3, 2012.
21. On January 29, 2013, WildEarth Guardians wrote the FWS FOIA Officer to notify him – once again – of the FWS’s violation of FOIA’s statutory time limits in connection with the subject FOIA request.

22. The January 29, 2013 letter specifically asked the FWS to provide an estimated date of completion for the FOIA request.
23. By letter of February 14, 2013, the FWS stated that it was reviewing responsive documents for potential redactions.
24. The February 14, 2013 letter failed to state any date by which WildEarth Guardians could expect to receive any documents in response to the subject FOIA request. Instead, the letter merely states that “we will provide you with a final response as soon as possible.”
25. In cases where “unusual circumstances” justify the FWS’s delay in responding to a FOIA request beyond the 20 day period established by statute – and such “unusual circumstances” do not exist in this case – then the FWS is required to provide a date “by which it expects to complete processing the request.” 43 C.F.R. §2.19(a)(2).
26. At no time has the FWS ever claimed that unusual circumstances justify its failure to provide the requested information to WildEarth Guardians within the time allotted by statute. 5 U.S.C. §552(a)(6)(B)(i). In fact, no such unusual circumstances exist.
27. At no point has the FWS ever proposed to WildEarth Guardians that WildEarth Guardians limit the scope of its request in order to avoid delay. 5 U.S.C. §552(a)(6)(B)(ii), 43 C.F.R. §2.19(b)(1).
28. The FWS’s own FOIA regulations state that the assignment of a FOIA request to a “complex” track – as in this case – does not alter the statutory deadline for a bureau to determine whether to comply with [a] FOIA request.” 43 C.F.R. §2.15(f).
29. To this date, the FWS has not produced a single document or record in response to the FOIA request, or estimated a date by which it would produce such documents or records.

30. Except in circumstances that are not relevant in this case, the FOIA requires federal agencies to “determine within 20 days . . . after the receipt of any [FOIA] request whether to comply with such request and . . . immediately notify the person making such request of such determination and the reasons therefor.” 5 U.S.C. §552(a)(6)(A)(I).
31. The FWS’s failure to produce the documents and records requested by WildEarth Guardians in the subject FOIA request within the mandatory twenty day period established by FOIA has frustrated and continues to frustrate WildEarth Guardians’ pursuit of its objective to educate its members, the public, and decision makers as to the environmental effects of federal government programs and activities.

#### **V. Cause of Action**

32. WildEarth Guardians incorporates the preceding paragraphs by reference as if fully set out herein.
33. The FWS has violated FOIA by failing to provide a substantive response to WildEarth Guardians’ request for documents and records within twenty days of receipt.
34. The FWS continues to violate FOIA by failing to respond to WildEarth Guardians’ request for documents and records.

#### **VI. Request for Relief**

WHEREFORE, WildEarth Guardians request that this Court:

35. Declare unlawful the FWS’s failure to respond to WildEarth Guardians’ request for documents and records within twenty days of receipt. 5 U.S.C. §552(a)(4)(B).
36. Order the FWS to produce immediately the documents and records requested by WildEarth Guardians. 5 U.S.C. §552(a)(4)(B).

37. Award WildEarth Guardians its reasonable attorney fees and costs incurred in prosecuting this civil action. 5 U.S.C. §552(a)(4)(E).
38. Grant such other and further relief as the Court deems just and proper.

Dated: March 14, 2013

Respectfully submitted,

/s/ Steven Sugarman

Steven Sugarman  
347 County Road 55A  
Cerrillos, New Mexico 87010  
(505) 672-5082

Attorney for Plaintiff WildEarth Guardians